Supreme Court, U. S.
FILED
SEP 24 1980
MICHAEL RODAK, JR., CLERK

No. 78-1945

In the
Supreme Court of the United States
October Term, 1978

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Petitioner,

vs.

STANLEY E. COUTU, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

REPLY BRIEF OF PETITIONER

Robert E. Mann
Attorney for Petitioner Universities Research Association, Inc.

Seyfarth, Shaw, Fairweather & Geraldson
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000
Of Counsel

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

PAGE

I. Congress Did Not Vest Federal Courts With Jurisdiction To Alter Existing Contracts By Making Post-Contracting and *De Novo* Davis-Bacon Act Coverage And Classification Determinations 1

A. Posture of the Case 1

B. Respondent's Inability to Defend His Position in Light of the Act and the Administrative Framework of the Act 3

II. URA Has Not Contracted To Compensate Its Own Employees At Rates Prevailing For Construction Trades Except Upon A Prior Agency Authorization 12

III. Respondent Has Failed To Show The Existence Of A Private Right Of Action To Establish Prevailing Wage Rate Contract Obligations 14

A. Procedural Considerations 14

B. The Absence of a Congressional Intent to Create a Private Right of Action to Enforce the Act 16

Conclusion 20

Table of Authorities Relied on

Cases

Cannon v. *University of Chicago,* 441 U.S. 677, 99 Sup. Ct. 1946 (1979) 16

Cort v. *Ash,* 422 U.S. 66, 95 Sup. Ct. 2080 (1975) 17

Endicott Johnson Corp. v. *Perkins,* 317 U.S. 501, 63 Sup. Ct. 339 (1943) 9

Gilloz v. *Webb,* 99 F.2d 585 (5th Cir. 1938) 8, 14

PAGE

International Association of Machinists v. *Hodgson*, 515 F.2d 373 (C.A.D.C. 1975) 10, 14

McDaniel v. *University of Chicago*, 548 F.2d 689 (7th Cir. 1977), *cert. denied*, 434 U.S. 1033, 98 Sup. Ct. 765 (1978) 6, 14

Nello L. Teer v. *United States*, 348 F.2d 533 (Ct. Cl. 1965) 10

North Georgia Building and Construction Trades Council v. *Goldschmidt, et al.*, ... F.2d ....., 27 CCF ¶ 80,567 (5th Cir., July 10, 1980) 5, 9

Perkins v. *Lukens Steel Co.*, 310 U.S. 113, 60 Sup. Ct. 869 (1940) 9, 14

Touche-Ross v. *Reddington*, 422 U.S. 560, 99 Sup. Ct. 2490 (1979) 19

United States v. *Binghamton Construction Co.*, 347 U.S. 171, 74 Sup. Ct. 438 (1954) 8

United States, et al. v. *Capelletti Brothers, Inc., et al.*, ... F.2d ..... (5th Cir. #78-2031, July 23, 1980) 5, 10

United States v. *Joseph A. Holpuch Co.*, 328 U.S. 234, 66 Sup. Ct. 1000 (1946) 10, 14

Whirlpool Corporation v. *Marshall*, ... U.S. ....., 100 Sup. Ct. 883 (1980) 19

STATUTES

Davis-Bacon Act § 276c 18

Portal-to-Portal Pay Act, 29 U.S.C. § 256 .....1, 18

Reorganization Plan No. 14 of 1950, 5 U.S.C. § 903 12

REGULATIONS

41 C.F.R. § 9-18.701-52 11

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1945

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Petitioner,

vs.

STANLEY E. COUTU, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

REPLY BRIEF OF PETITIONER

I.

Congress Did Not Vest Federal Courts With Jurisdiction To Alter Existing Contracts By Making Post-Contracting, and De Novo Davis-Bacon Act Coverage And Classification Determinations.

A. Posture of the Case

This lawsuit is between a former electronics technician employee[1] of Petitioner URA[2] relative to work he per-

---

[1] The District Court granted class action certification authorizing Respondent-Plaintiff Coutu to represent an alleged class of "mechanics and laborers" (see relevant docket entry of 8/4/76 (App. 1)). The Portal-to-Portal Pay Act, 29 U.S.C. § 256, requires that individuals file written consents to toll the applicable limitations period. To date, only Mr. Coutu has filed such a consent.

formed, pursuant to a contract between URA and the federal government, at the Fermi National Accelerator Laboratory (App. 3-12). He contends that his electronics technician work was "construction" work within the meaning of the Davis-Bacon Act and, therefore, that he was entitled to receive wages computed with respect to rates prevailing for construction workers in the area where the work was performed.[3] The suit was dismissed by the District Court upon an unrebutted showing that no administrative determination had been made holding Respondent's work to have been thus subject to the Act. The Court held it did not have jurisdiction to make a *de novo* or original determination relative to Davis-Bacon Act application and/or to judicially amend the underlying federal contract to provide the requested prevailing rate stipulations, upon suit by a private party (App. pp. 20-34).

The Court of Appeals reversed, holding that the Davis-Bacon Act was incorporated by law into the applicable

---

[2] Universities Research Association, Inc., a not-for-profit incorporated consortium of North American universities under contract to the United States through its Department of Energy (formerly through the Energy Research Development Administration (ERDA) and the Atomic Energy Commission AEC)). As in our principal brief, references to the contracting agency will be made herein as "AEC/ERDA", to the Petitioner as "URA", to the project site as "Fermilab" and to the contract as "the contract". References to the Joint Appendix will be made as (App. p. 6).

[3] The Respondent apparently does not base his claim upon rates prevailing for electronics technicians; rather, he claims a right to have been paid at rates prevailing for skilled trades construction electricians. He admits, however, that he has not been certified to work in the latter trade (Coutu dep. ff.).

contract. It held, albeit with considerable equivocation, that the District Court did have jurisdiction to make original or *de novo* coverage and classification determinations under the Act upon suit by a private party directly against the contractor, nothwithstanding the existence or absence of any coverage determination by the contracting agency and despite the fact that the contract pursuant to which Respondent worked included government approved rate schedules applicable to his work (App. pp. 35-46).

B. Respondent's Inability to Defend His Position in Light of the Act and the Administrative Framework of the Act

The principal argument advanced in support of Respondent's suit asserts that the Davis-Bacon Act requirment for payment of prevailing rates is unequivocally mandatory irrespective of agency action or contract terms; therefore, so the argument goes, since *one* purpose of this contract was to facilitate construction of Fermilab—a public work—the Davis-Bacon Act was embodied in the contract by operation of law, and anyone performing work in connection with the project automatically became entiled to prevailing wage rate treatment by right enforceable in a private action before the Federal Courts.

URA does not disagree that facilitation of construction was *one* purpose of the contract; URA's role to that end was to supervise and administer such construction, drawing on its member institutions' scientific expertise to ensure that this highly sophisticated laboratory was properly constructed to meet the demands of research efforts to be conducted there. Granting, therefore, that one purpose of the contract was to facilitate a federal construction

project, the contract had other purposes as well: *e.g.*, the post-construction administration, operation and use of Fermilab. Respondent points out that the original URA-AEC contract did not reference "administration, operation and use" (Brief for Respondents, pp. 2-3). As he admits, however, the contract was reissued effective April 6, 1972, and the reissued contract did then provide for discharge of those responsibilities by URA. *Ibid.* In this connection, it should be noted that the instant suit was filed in 1975, three years after reissuance of the contract, and is based upon the Respondent's work activities performed during his period of employment from September 25, 1972 to September 10, 1975, in the capacity of electronics technician assigned to supervise and monitor accelerator operations (Coutu dep., ff.).

URA was authorized to employ at government expense the personnel necessary to carry out its responsibilities. The contract provides what such persons—including electronics technicians—are to be paid (App. pp. 54-61).[4] Therefore, even if Respondent's "incorporation by law" theory were found to have any merit, the argument simply does not go far enough. It fails to deal with the central question whether the Congress conferred upon the courts

---

[4] URA is a not-for-profit entity and uses government funds exclusively to carry out its responsibilities under the contract. The Appendix material cited includes relevant portions of the contract respecting the limits of URA's authority to compensate employees with such funds, including the schedule of rates applicable to employees paid a weekly salary (including electronics technicians) and the hourly rate schedule applicable to skilled instrument makers, machinists and welders who work in the laboratory machine shops and are represented by a craft union. (App. p. 61)

jurisdiction to determine, in the context of a post-contract action against a contractor, that particular work activities constituted "construction" as opposed to "administration, operation, and use" of the facility. Respondent contends, apparently, that the federal court had such jurisdiction without regard to determinations made by the agencies but cannot cite any convincing authority to that effect.

We respectfully submit that there is no such authority because it is clear that there is no jurisdiction in the federal courts to determine which work is or is not subject to prevailing rate requirements in the circumstances presented by this case. *North Georgia Building and Construction Trades Council* v. *Goldschmidt et al.*, ... F.2d ....., 27 CCF ¶ 80,567 (5th Cir., July 10, 1980), cited by *Amicus* AFL-CIO at pp. 4, 17 of its brief, held that *pre*-contracting Davis-Bacon Act classification decisions by the federal agencies are subject to judicial review under the Administrative Procedure Act in actions brought against the agencies. As *Amicus AFL-CIO* points out in the text accompanying its citation of *North Georgia,* however, a pre-contracting right of action under the APA to challenge an agency determination is a far different circumstance than that presented here: *i.e.,* a *post*-contracting action against a private contractor who, as must be conceded, is not even alleged to be in violation of his contract.

It should be noted, in this context, that the Court deciding the *North Georgia* case soon thereafter issued a decision holding that the Davis-Bacon Act afforded no private right of action by an employee against his contractor-employer. *United States, et al.* v. *Capelletti Brothers, Inc., et al.*, ... F.2d ..... (5th Cir. #78-2031, July 23, 1980). In so holding, the Fifth Circuit expressly re-

jected the contrary holding of the Seventh Circuit in *McDaniel* v. *University of Chicago,* 548 F.2d 689 (7th Cir. 1977), *cert. denied,* 438 U.S. 1033, 98 Sup. Ct. 765 (1978), the case upon which the Seventh Circuit premised its decision in this case.

Many policy and legal considerations militate against endorsement of Respondent's theory regarding the crucial question as to the locus of jurisdiction to determine what work activities are or are not subject to Davis-Bacon Act prevailing rate requirements and the time when such determination must be made in order to obligate a private contractor.

Thus, it must be recognized that what Respondents urge here is that *any* employee of a government contractor has the right, at *any* time pre, during, or post contracting, to apply for a District Court determination that his or her work is "construction" work and that he is entitled to a prevailing rate wage. Obviously, however, no businessman or, as here, not-for-profit entity, will be encouraged to contract with the government if, in so doing, he or it risks such *post-* contracting litigation and/or liabilities, based upon applicability of this particular Act. As *Amicus* United States points out, endorsement of the Respondent's theory in this case would completely destabilize and confuse government contracting, so much of which relies on employment of individuals working in a vast number of occupations.

Endorsement of Respondent's theory that the Act operates independently of any administrative framework for pre-contract determinations also would have to ignore at least two significant historical expressions of a Congressional policy to the contrary.

First is the history surrounding the 1935 amendments to the Act, requiring pre-contract resolution of coverage disputes in order to avoid post-contract litigation and uncertainty. As Respondent points out, the original Act fostered much controversy over who was covered and what rates were applicable (Brief for Respondents, pp. 31-34). To stem that controversy and restore order to the government contracting processes, Congress amended the Act to vest essentially final jurisdiction in the Department of Labor to make coverage and classification determinations. We submit, respectfully, that the choice of Congress to vest the Executive with authority to make such determinations reflects a clear expression of concern that achievement of the socio-economic goals embodied in the Act not be had at the cost of wholesale disruption of federal contracting programs; the policy, in short, sought to achieve a *balance* between efficient contracting and the social objective, not one at the expense of the other.

Second is the 1962-63 Congressional refusal to legislate for any type of judicial intervention in the rate determination processes (see Brief for Petitioner, pp. 15-20). As discussed in our principal brief, the events in Congress during 1962-63 hearings on proposed Davis-Bacon Act amendments show that Congress *categorically* rejected the notion that Courts should have any jurisdiction to interfere with the contracting processes. It chose, instead, to rely on the agencies' ability — under supervision of the Labor Department — to carry out congressional policies regarding labor provisions in federal contracts. Whether or not that choice was appropriate is a matter of legislative, not judicial, concern.

The legislative history thus plainly shows that Congress did not intend originally and has never intended to allow

the Federal Courts to disrupt federal contracting programs by assuming the agencies' role therein. Congress clearly adopted a balanced policy designed overall not unreasonably to interfere with federal contracting, or to result in uneven, decentralized decision-making under the Act. Respondent's theory would require that the Court ignore that policy.

Respondent's theory also is contrary to all judicial expression — save that of the Court of Appeals' decision rendered below — rendered since the Act was adopted. The first Appellate-level opinion construing the Act was by the Fifth Circuit, in *Gilloz* v. *Webb,* 99 F.2d 585 (5th Cir. 1938); that Court held that rights provided under the Act hinged upon there first being a pre-contracting determination by the Executive Branch as to coverage and classification of work. *Gilloz* v. *Webb* was endorsed by this Court in *United States* v. *Binghamton Construction Co.,* 347 U.S. 171, 74 Sup. Ct. 438 (1954). Respondent cites *Binghamton Construction* for the proposition that the Davis-Bacon Act was adopted solely to benefit workers, not contractors (Brief for Respondent, pp. 11 *et seq.*). The point is not germane here, however, because URA is not arguing that the Act benefits it in the sense urged by the employer in *Binghamton* (Binghamton contended the stipulations required by the Act constituted representations as to the maximum rates to be paid and that it was entitled to extra compensation in relation to excess rates it was required to pay in order to acquire sufficient labor for the job). URA cites *Gilloz* and *Binghamton* as precedent for its position that action by the agencies is *sine qua non* to creation of a right to the minimum wage provisions of the Act, and that the Act does not operate in the absence thereof.

Similarly, in *Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501, 63 Sup. Ct. 339 (1943), and *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113, 60 Sup. Ct. 869 (1940), this Court held that individual rights based upon federal contract labor statutes depend upon agency action which is not subject to judicial review. Most recently, the Fifth Circuit Court of Appeals, in *United States, et al.* v. *Capelletti Brothers, Inc., et al.,* ..... F.2d ..... (5th Cir. #78-2031, July 23, 1980) held that individual workers claiming to have been misclassified by their employer for purposes of Davis-Bacon Act wage rate treatment must look solely to the Department of Labor for relief. *Cf., North Georgia Building and Construction Trades Council* v. *Goldschmidt, et al.,* ..... F.2d ....., 27 CCF ¶80,567 (5th Cir., July 10, 1980) holding that a pre-contract coverage decision by the Department of Labor Wage Appeals Board was subject to limited judicial review under the Administrative Procedure Act.

Finally, the literal terms of the Act belie Respondent's contention that the various courts would have jurisdiction to make post-contracting determinations as to what work activities are or are not to be considered "construction" under the Act. Section 1 clearly is directed to the contracting agency — not the contractor — wherein it provides that the *bid specifications* (prepared, obviously, by the agency) describe and define prospective obligations stemming from the Act and provides further that contracts *based upon such specifications* contain the Davis-Bacon Act wage stipulations. The obvious intent of that statutory phraseology was to place the obligation for compliance with Congressional policy upon the agency and, in turn, to direct any individual allegedly aggrieved under the statute (contractor or employee) to the agency and/or

the Department of Labor for relief. Such intent was recognized by the Fifth Circuit in *U.S.* v. *Capelletti, supra,* and, with respect to this or comparable legislation, by the Second Circuit in *International Association of Machinists* v. *Hodgson,* 515 F.2d 373 (C.A.D.C. 1975), the Court of Claims in *Nello L. Teer* v. *United States,* 348 F.2d 533, 539-40 (Ct. Cl. 1965), and by this Court in *United States* v. *Joseph A. Holpuch Co.,* 328 U.S. 234, 66 Sup. Ct. 1000 (1946) (holding the courts have no jurisdiction to alter federal contracts).

The Respondent simply has not shown any policy or legal basis for his assertion that the various Federal District Courts have jurisdiction to make *de novo* post-contracting determinations concerning what work activities are or are not covered by the Act. Clearly, Congress chose to vest the authority to make such determinations exclusively in the agencies with right of appeal solely to the Department of Labor. Moreover, Congress clearly intended that whatever jurisdiction or avenue of appeal exists, such must be exercised *prior to contracting.*

Therefore, even if the Respondent were correct that the instant contract somehow incorporated the Davis-Bacon Act by implication of law, the contract must be viewed as having incorporated the Act *in toto,* along with its administrative scheme and the long unchallenged application of its terms. Viewed in such context, it should be clear that Respondent's theory has no merit. The Act literally, and as construed by the courts, agencies, legislative expressions, and consistent practice, does not operate in the absence of *pre contract* administrative action to determine the work activities which shall be deemed covered there-

by. The Act could not operate otherwise without totally destabilizing government contracting.[5]

Therefore, the intent and purpose of the balanced legislative scheme require that challenges to agency action must be addressed to the agency, not to the contractor in a post-contracting setting. *North Georgia, supra; Capelletti Bros., Inc., supra.* Respondent does not explain why he did not address his claim to AEC/ERDA and/or the Department of Labor as did the complaining parties in the *North Georgia,* and *Capelletti* cases and in the other cases cited therein. As noted above, AEC/ERDA supplied all funds for his compensation as well as for the entire project. AEC/ERDA had regulatory authority to administer compliance with the Davis-Bacon Act, see 41 C.F.R. § 9-18.701-52 (Administrative controls and cri-

---

[5] Respondent appears to concede that such would be the case if his position were upheld. See Brief for Respondent at pp. 34-35, wherein he argues that federal contracting obviously would be more efficiently conducted in the absence of the Davis-Bacon Act. He fails, however, to show how his claim for post-contracting judicial intervention against a contractor would be consistent with the balance struck by Congress between social objectives and efficient contracting. As Respondent notes, moreover, the history of the Act between the time of its original enactment in 1931 and the 1935 amendments calling for predetermination, was one of confusion and frequent litigation over alleged abuses which Congress sought to eliminate and cure by means of pre-contracting administrative action. Brief for Respondents, pp. 31-34. If Respondent's views are upheld, federal contracting obviously will return to just such a condition as existed in the period described by the Respondent, with the federal courts thrown open to claims by any and all persons associated—however remotely—with federal-funded construction projects suing to receive prevailing rates.

teria for application of the Davis-Bacon Act in operational or maintenance activities), and the Department of Labor, of course, has pervasive authority to administer and enforce compliance with the Act (see Section 276c of the Act — App. p. 52); Reorganization Plan No. 14 of 1950, 5 U.S.C. § 903. The obvious inference to be derived from his silence on this point is that he realized or believed that his claim would be rejected.[6]

II.

URA Has Not Contracted To Compensate Its Own Employees At Rates Prevailing For Construction Trades Except Upon A Prior Agency Authorization

As noted by the Courts below, the contract provided that work which AEC/ERDA determined to be covered by the Act would be subcontracted by URA and that such subcontracts would include the usual Davis-Bacon Act implementory provisions (App. pp. 22, 32, 39, 55); the contract expressly recited, however, that the parties did not contemplate that such work would be performed by URA with its own employees (*Ibid.*). These provisions, coupled with the authorized rate schedules incorporated into the contract and applicable to URA employees including technicians (see App. pp. 54-61), clearly show that AEC/ERDA did not regard the work activities of URA's employees as being Davis-Bacon Act-covered, or authorize URA to pay such employees at prevailing construction trade rates.

While seeming to acknowledge the fact, Respondent points to certain correspondence which passed between

---

[6] As noted by *Amicus* AFL-CIO, this case does not present the issue whether agency action is subject to judicial review and we do not, therefore, discuss it.

AEC/ERDA and URA raising the possibility of exceptions to the general understanding. See Brief for Respondents at pp. 17-18; App. pp. 62-63. The District Court also noted the existence of such correspondence and, because of it, refused to dismiss the complaint entirely in ruling on URA's original motion to dismiss; the Court left the case open solely to permit Respondent an opportunity to show, if he could, the existence of AEC/ERDA determination(s) that his work was subject to the requirements of the Act (App. pp. 24-25).[7]

Despite the taking of numerous depositions and invoking extensive Freedom of Information Act inquiry, Respondent was unable to show the existence of any such determination (App. pp. 32-33), or to rebut the affidavit appended to URA's subsequent motion for summary judgment.

It is clear, therefore, that URA has assumed no contract obligation to pay its electronics technicians at skilled

---

[7] The District Court stated:

> This correspondence leaves open the possibility of performance of Davis-Bacon Act work by defendant's employees pursuant to proper Davis-Bacon Act determinations with regard to the work to be performed . . .
>
> * * *
>
> "This Court does not thereby seek to review the determinations of the Secretary of Labor or of the contracting agency; rather, the Court gives plaintiff leave to show that the Secretary of Labor through ERDA has made Davis-Bacon determinations with respect to the alleged contract, and that plaintiff and the class have performed such work at defendant's direction, pursuant to the contract."
>
> (App. pp. 24-25; see also the District Court's second opinion at App. p. 31, summarizing the foregoing.)

trade construction electricians rates. To force such obligation upon URA would require that the District Court assume the role of contracting agency, make a post-contracting coverage determination favorable to Respondent, and retroactively amend the contract accordingly. Such actions would be inconsistent with the pre-contract determination principle embedded in the Act, would violate the Separation of Powers doctrine, and would be contrary to all known judicial and administrative precedent. *United States* v. *Joseph A. Holpuch Co., supra; Perkins* v. *Lukens Steel Co., supra; International Association of Machinists* v. *Hodgson,* 515 F.2d 373 (C.A.D.C. 1975); *Gilloz* v. *Webb, supra.*

III.

Respondent Has Failed To Show The Existence Of A Private Right Of Action To Establish Prevailing Wage Rate Contract Obligations

A. Procedural Considerations

The Respondent argues that the question of a private right of action was not raised in the Court of Appeals, and, therefore, should not now be considered. However, Respondent made the same argument to this Court in opposing the Petition for Certiorari. This Court nevertheless granted the Petition, following receipt of the Brief for the United States as *Amicus Curiae* in which the Solicitor General pointed out that the question obviously is central to the controversy. Brief for the United States at fn. 7.

Moreover, Respondent's contention is belied by the very posture of this case. In 1977, the Court below rendered its decision in *McDaniel* v. *University of Chicago, supra.* In that decision, the Court of Appeals declared, in ruling

on a motion to dismiss, the existence of a private right of action to enforce an alleged *express* contract commitment to pay prevailing rates. 512 F.2d at 588, and on remand, 584 F.2d 692. Because the right of action recognized by the Court of Appeals in *McDaniel* was predicated upon the alleged existence of an *express* contract to pay the claimed rates, the United States, in connection with the Petition for Certiorari filed in that case, urged that *McDaniel* was not appropriate for review since, if the central allegation of express contract proved untrue, the case would be dismissable in any event. Brief of United States as *Amicus Curiae* in *McDaniel* v. *University of Chicago, supra* (U.S. Supreme Court case no. 76-1764), at pp. 30-31; Brief of the United States as *Amicus Curiae* in this case, at pp. 10-12.

In accord with such considerations, it was argued to the Court below, in part, that since its recognition of a right of action in *McDaniel* was predicated upon the assumption that there existed an *express* contract obligation to pay Davis-Bacon Act-contemplated prevailing rates, the District Court properly dismissed the instant case when no such express contract obligation could be shown *Coutu, et al.* v. *Universities Research Association, Inc.*, Brief of Defendant-Appellee [URA], at pp. 8-10.

The Court, however, substantially and qualitatively extended the *McDaniel* holding in this case. It ruled not only that Congress gave the federal courts jurisdiction to enforce an existing, predetermined and express obligation to pay Davis-Bacon Act rates; the court below held that Congress conferred jurisdiction in the courts to *create and retroactively enforce new obligations after a contract has been performed,* based upon it's own perception of coverage and classification of work. When the in-

stant Petition for Certiorari and the United States' position is viewed in the context of this case, therefore, it is obvious that Respondent's assertion that the jurisdiction (or right of action) issue was never raised is misleading and should be rejected.

B. The Absence of a Congressional Intent to Create a Private Right of Action to Enforce the Act

Respondent argues simply that Congress intended the Davis-Bacon Act to be self-enforcing without regard to and/or apart from its administrative framework; to deny an employee the oportunity to seek an original/*de novo* judicial determination that his completed work activities were covered by the Act would undermine Congress' social policies, argues Respondent (Brief for Respondents, at pp. 48-50, citing *Cannon* v. *University of Chicago,* 441 U.S. 677, 99 Sup. Ct. 1946 (1979).

Respondent's reliance on *Cannon* is obviously misplaced, however, because the statutory scheme addressed there was described by Congress unequivocally in terms of protections conferred upon certain individuals. Conversely, Congress described its policy regarding prevailing rates in terms directed at the contracting agencies; the rights and protections afforded employees by that Act are derivative of and conditioned by, agency action. *Cf., Cannon* v. *University of Chicago, supra,* 441 U.S. at 693, 99 Sup. Ct. at 1955; *U.S.* v. *Capelletti Brothers, Inc., supra,* at part II.1 of the Court's opinion. As we argued above and in our principal brief, the legislative history of the Act leads inexorably to the conclusion that Congress' original desire that locally prevailing rates be paid for work on federal construction projects was tempered by its 1935 amendments to the Act. Those

amendments required that the prevailing rate policy be implemented by *pre-contract* administrative determinations in order to avoid post-contracting disruptions of federal projects. The Fifth Circuit recently recognized in *U.S.* v. *Capalletti Brothers, Inc., supra,* that the Act focuses on the duty of the contracting agencies properly to carry out the congressional policy that federal projects not undermine local labor markets, as opposed to an unequivocal right in individuals to receive particular wage rates. Under the scheme of the Act, the latter clearly is derivative of, and conditioned upon, the former; the Act simply does not operate—at least as against a private contractor—in the absence of an agency predetermination as to its aplicability to the particular work activity in question.

Thus, apropos the tests applied by this Court to ascertain whether Congress intended to create private rights of action in order to further legislative policy, cf. *Cort* v. *Ash,* 422 U.S. 66, 95 Sup. Ct. 2080 (1975), while the employee is *a* beneficiary of the Davis-Bacon Act, the employee cannot reasonably be said to be an *especial* beneficiary to the extent urged by Respondents—*i.e.,* so much an "especial beneficiary" that the interests of the government and of contractors in avoiding post-contract disruptions must be ignored. Clearly, by its 1935 amendments, Congress expressed a policy that questions of coverage and classification of work, as well as of specific rates, be resolved in a pre-contracting centralized administrative setting. It is obvious that entertainment of such issues in a post-contracting judicial setting via *ad hoc* individual litigation would be destructive of that policy designed to preserve efficient execution of federal projects. It cannot be assumed that Congress implicitly

intended to create an individual right of action divorced from the administrative scheme to secure the individual benefits afforded by the Act.

Apart from the Respondent's inability to square his claim for a post-contracting right of action against the contractor (urging the court to make an original and retroactively applicable coverage determination), with Congress' expressed policy to avoid such disputes, Respondent has failed to show any other traditionally recognized indicia of congressional intent to create such a right of action. *Cort* v. *Ash, supra.* Thus, he has failed to find any support in the legislative history. Both the 1935 amendments and the history of later unsuccessful attempts at further amendment run contrary to Respondent's position. See discussion of this point at pp. 15-20 of Petitioner's principal brief and at p. 13 of the Brief for the United States as *Amicus Curiae.*

Further, as pointed out by the Fifth Circuit Court of Appeals in *U.S.* v. *Capelletti Brothers, Inc., supra,* at part II.2 of that Court's opinion, the Portal-to-Portal Pay Act statute of limitations issue raised by the instant Respondent (Brief for Respondents, pp. 46-48) is not persuasive. The history of that Act plainly shows that Congress did not believe it was creating a right of action divorced from the existing Davis-Bacon Act enforcement scheme when it adopted the Portal-to-Portal Act.

Similarly, Respondent has not shown how the proposed right of action would enhance the legislative scheme. It would do just the opposite, because it would upset the balance struck by Congress between its concern for payment of prevailing rates and its concern that federal pro-

jects not be disrupted by post-contracting disputes. This is not simply a case wherein the proposed remedy allegedly fills an unintended gap in the legislation, *cf. Whirlpool Corporation* v. *Marshall,* ..... U.S. ....., 100 Sup. Ct. 883 (1980); it is a case wherein the proposed remedy is an ill-disguised attempt to redefine an overall congressional objective by urging removal of administrative functions to the courts and by removing the timing of such functions from pre-contract to post-contract settings. This Court has strongly admonished, however, that:

> "The ultimate question [in implication cases] is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law."
>
> *Touche-Ross* v. *Reddington,* 422 U.S. 560, 578, 99 Sup. Ct. 2490 (1979).

In short, Respondent has not shown a basis for implying a right of action as proposed by Respondent. To imply such a right would, moreover, defeat a plainly stated congressional objective.

Conclusion

For the foregoing reasons, we again respectfully urge the Court to reverse the ruling of the Court of Appeals.

Respectfully submitted,

ROBERT E. MANN
Attorney for Petitioner Universities Research Association, Inc.

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000
Of Counsel